



To: Review Group on Global Signals Intelligence Collection
and Communications Technologies
From: Bill of Rights Defense Committee
Date: October 4, 2013
Re: Public comment pursuant to September 4 announcement

On September 4, 2013, the Review Group on Global Signals Intelligence Collection and Communications Technologies (the “Review Group”) announced an invitation for public comment pursuant to the President’s establishment of the group on August 12.¹ This memorandum is presented for submission “as part of the official record of the Review Group’s activity.”

1. Introduction

The United States has long pursued data collection as part of its national security program. Recent revelations that the National Security Agency (NSA) has turned its substantial powers towards spying on American citizens—en masse, without suspicion—have raised serious and troubling constitutional questions.²

The first public details regarding the scope of the NSA’s domestic spying program came to light despite active efforts across the executive branch to suppress them.³ In the wake of leaks by NSA subcontractor Edward Snowden, Americans—including members of Congress—have voiced widespread outrage about how the NSA’s activities render them presumptive suspects, without transparent debate.⁴ The disclosures finally enabled a long

¹ See Office of the Director of National Intelligence, *Review Group on Global Signals Intelligence Collection and Communications Technologies Seeks Public Comment*, (Sep. 4, 2013), available at <http://icontherecord.tumblr.com/post/60323228143/review-group-on-global-signals-intelligence>; The White House, *Presidential Memorandum -- Reviewing Our Global Signals Intelligence Collection and Communications Technologies* (Aug. 12, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/08/12/presidential-memorandum-reviewing-our-global-signals-intelligence-collec>.

² See e.g., New York Times, *Close the NSA’s Back Doors*, NY Times (Sep. 22, 2013), available at <http://www.nytimes.com/2013/09/22/opinion/sunday/close-the-nas-back-doors.html>; *What Is PRISM?*, Gizmodo (June 7, 2013), available at <http://gizmodo.com/what-is-prism-511875267>; .

³ See Spencer Ackerman, *NSA: It Would Violate Your Privacy to Say if We Spied on You*, Wired (June 18, 2012), available at <http://www.wired.com/dangerroom/2012/06/nsa-spied/>; Glenn Greenwald, *Boundless Informant: the NSA’s secret tool to track global surveillance data*, The Guardian (June 11, 2013), available at <http://www.theguardian.com/world/2013/jun/08/nsa-boundless-informant-global-datamining> (“disclosure of the internal Boundless Informant system comes amid a struggle between the NSA and its overseers in the Senate over whether it can track the intelligence it collects on American communications. The NSA’s position is that it is not technologically feasible to do so.... Other documents... further demonstrate that the NSA does in fact break down its surveillance intercepts which could allow the agency to determine how many of them are from the US.”); Levi Sumagaysay, *NSA Spying: Feds Fight Tech’s Call For Disclosure*, Silicon Beat (Oct. 3, 2013), available at <http://www.siliconbeat.com/2013/10/03/nsa-spying-feds-fight-techs-call-for-disclosure-collecting-location-data-lavabit-owner-talks/>.

⁴ See Matt Fuller, *Amash NSA Push Falls Just Short After Spirited Debate*, Roll Call (July 24), available at <http://blogs.rollcall.com/218/amashs-nsa-amendment-goes-down-in-defeat/> (“The White House and Republican and Democratic leadership marshaled their forces Wednesday to narrowly defeat an attempt... to defund the National Security Agency’s blanket collection of telephone records.”); Shahid Buttar, *Protests around the country challenge NSA on Independence Day*, People’s Blog for the

overdue debate, with mounting criticism of government spying extending even to architects of the PATRIOT Act.⁵

The following concerns address the NSA's programs, as well as the President's recent call for oversight from the Director of National Intelligence (DNI) and the legitimacy of the Review Group.

2. NSA spying is overbroad and should be curtailed

The American public anticipated that the NSA would, pursuant to its national security mission, conduct intelligence gathering targeted at suspected terrorists. We did not expect these surveillance activities to extend to everyone in the country.⁶ Many Americans fear that the threat of terrorism has been exploited and manipulated to justify massive surveillance with applications disconnected from its stated purpose of keeping us safe.

The scope of the NSA's dragnet on the American people has grown to encompass tapping the Internet and phone system,⁷ co-opting technology companies and recruiting spies within them,⁸ monitoring online social media,⁹ enabling targeted email surveillance at will and without any supervisory or oversight controls,¹⁰ and hacking cell phone location data.¹¹

Constitution (July 5, 2013), available at <http://www.constitutioncampaign.org/blog/?p=13996>; Shahid Buttar, *Civil liberties movement wins by losing a key House vote*, People's Blog for the Constitution (July 25, 2013), available at <http://www.constitutioncampaign.org/blog/?p=14368>.

⁵ See James Sensenbrenner, *This abuse of the Patriot Act must end*, The Guardian (June 9, 2013), available at <http://www.theguardian.com/commentisfree/2013/jun/09/abuse-patriot-act-must-end> ("'Big Brother' is watching. And he is monitoring the phone calls and digital communications of every American").

⁶ See Jonathan Stray, *FAQ: What You Need to Know About the NSA's Surveillance Programs*, ProPublica (June 27, 2013), available at <http://www.propublica.org/article/nsa-data-collection-faq> (describing how pervasively regular Americans are covered by overbroad NSA surveillance programs).

⁷ See Glenn Greenwald, *NSA collecting phone records of millions of Verizon customers daily*, The Guardian (June 5, 2013), available at <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>.

⁸ See Charles Arthur, *Ex-Microsoft privacy adviser: I don't trust company after NSA revelations*, The Guardian (Sep. 30, 2013), available at <http://www.theguardian.com/world/2013/sep/30/microsoft-privacy-chief-nsa>.

⁹ James Risen & Laura Poitras, *N.S.A. Gathers Data on Social Connections of U.S. Citizens*, NY Times (Sep. 28, 2013), available at <http://www.nytimes.com/2013/09/29/us/nsa-examines-social-networks-of-us-citizens.html>.

¹⁰ See Glenn Greenwald, *XKeyscore: NSA tool collects 'nearly everything a user does on the internet'*, The Guardian (July 31, 2013), available at <http://www.theguardian.com/world/2013/jul/31/nsa-top-secret-program-online-data>.

¹¹ See Paul Lewis, *NSA chief admits agency tracked US cellphone locations in secret tests*, The Guardian (Oct 2, 2013), available at <http://www.theguardian.com/world/2013/oct/02/nsa-us-cell-phone-data-location-programs>.

Whistleblowers have alleged even broader programs,¹² which together substantially comprise the Total Information Awareness program that Congress affirmatively rejected in 2003.¹³

The lack of particularized and individual suspicion long required to constitutionally conduct surveillance in other contexts renders the NSA's various domestic spying programs among the most severe threats that our Constitution confronts. Anyone with a phone or computer is presumptively treated like a suspect, with data collection ranging well beyond any basis for individualized suspicion.¹⁴

The Fourth Amendment remains part of the Constitution, and permits neither physical searches, nor their digital equivalents (i.e., collection of online or electronic intelligence data) absent individual suspicion. As in other contexts, government scrutiny—data collection—must be (i) justified by specific articulable facts¹⁵ (ii) giving rise to individual suspicion,¹⁶ (iii) limited only to their proper scope,¹⁷ and (iv) overseen by a transparent court,¹⁸ in order to satisfy constitutional guarantees.

All NSA domestic surveillance and intelligence collection programs, including XKeyscore, PRISM, Boundless Informant, bulk collection of telephone metadata, any collection of Internet content or traffic logs under Section 702 of FISA or any other legal authority—and any further programs not yet revealed to the public and Congress through leaks—must be curtailed to comply with these requirements. If the executive branch does not voluntarily adopt these changes, Congress, the courts, and the American people will impose them.

¹² See Michael Kelley, *Latest Glenn Greenwald Scoop Vindicates One of The Original NSA Whistleblowers*, Business Insider (June 27, 2013), available at <http://www.businessinsider.com/nsa-whistleblower-william-binney-was-right-2013-6#ixzz2gixQow00>; Peter Eisler & Susan Page, *3 NSA veterans speak out on whistle-blower: We told you so*, USA Today (June 16, 2013), available at <http://www.usatoday.com/story/news/politics/2013/06/16/snowden-whistleblower-nsa-officials-roundtable/2428809/>.

¹³ See Adam Clymer, *Electronic Surveillance; Congress Agrees to Bar Pentagon from Terror Watch of Americans*, NY Times (Feb. 12, 2003), available at <http://www.nytimes.com/2003/02/12/us/threats-responses-electronic-surveillance-congress-agrees-bar-pentagon-terror.html>.

¹⁴ See Timothy Lee, *Report: NSA asked Verizon for records of all calls in the U.S.*, The Washington Post (June 5, 2013), available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/05/nsa-asked-verizon-for-records-of-all-calls-in-the-u-s/>.

¹⁵ See *Terry v. Ohio*, 392 U.S. 1 (1968).

¹⁶ See *US v. Jones*, 565 U.S. ____ (2012) (rejecting GPS surveillance beyond the terms of an approved judicial warrant); *Florida v. Jardines*, 569 U.S. ____ (2013) (rejecting the warrantless use of a drug sniffing dog “to explore the area around the home in hopes of discovering incriminating evidence”).

¹⁷ See 50 USC § 1802(a)(1)(C) (requiring minimization procedures).

¹⁸ See Alexander Hamilton, the Federalist Papers, No. 78 (1788) (“[L]iberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments.... The complete independence of the courts of justice is peculiarly essential....”)

3. NSA spying programs are ripe for abuse

The NSA's domestic surveillance programs have largely evaded meaningful judicial review. Constitutional challenges have been impeded by executive secrecy,¹⁹ while the secret FISA court has not proven to exercise an effective check or balance.²⁰

Meanwhile, congressional oversight has also been meager, particularly because NSA officials and the DNI have proven less than forthcoming, at best, in response to congressional inquiries.²¹

Among the most pressing concerns about the NSA's domestic spying efforts is the possibility that its powers can be easily—and secretly—abused at both the departmental and individual level. Some of these fears have already been realized, as evidenced by the admissions of NSA agents who have already used state surveillance technology to stalk their former lovers.²²

Beyond the vulnerability for abuse by individuals, the NSA's domestic surveillance activities can also be inappropriately directed at an institutional level. Whether due to “the complexity of the technology” enabling inadvertent violations, or an express intention to circumvent the First and Fourth Amendments, the NSA cannot be relied upon to protect the privacy of Americans.²³

Until sufficient transparency coupled with a history of forthright disclosure earn the trust of Congress and the American public, secret NSA surveillance will remain incompatible with our national commitment to a free and open society.

¹⁹ See *Clapper v. Amnesty Int'l*, 568 U.S. ____ (2013) (upholding the dismissal of a constitutional challenge to dragnet NSA spying on standing grounds).

²⁰ See Christopher H. Pyle, *The Secret Court: Is it Constitutional?*, People's Blog for the Constitution (August 9, 2013), available at <http://www.constitutioncampaign.org/blog/?p=14529>; Glenn Greenwald, *Fisa court oversight: a look inside a secret and empty process*, The Guardian (June 18, 2013), available at <http://www.theguardian.com/commentisfree/2013/jun/19/fisa-court-oversight-process-secrecy>.

²¹ See Anita Kumar and Lesley Clark, *Congress outraged by news that NSA frequently broke privacy rules*, McClatchy (Aug. 16, 2013), available at <http://www.mcclatchydc.com/2013/08/16/199621/news-that-nsa-frequently-broke.html#storylink=cpy>; Glenn Greenwald, *Members of Congress denied access to basic information about NSA*, The Guardian (Aug. 4, 2013), available at <http://www.theguardian.com/commentisfree/2013/aug/04/congress-nsa-denied-access>; Glenn Greenwald, *Sen. Ron Wyden: NSA 'repeatedly deceived the American people'*, The Guardian (Sep. 27, 2013), available at <http://www.theguardian.com/commentisfree/2013/sep/27/ron-wyden-nsa-systematically-deceived>.

²² See Siobhan Gorman, *NSA Officers Spy on Love Interests*, The Wall Street Journal (August 23, 2013), available at <http://blogs.wsj.com/washwire/2013/08/23/nsa-officers-sometimes-spy-on-love-interests/>.

²³ See Gregory Ferenstein, *Court: NSA Violated Privacy Because No One Understood The Rules*, TechCrunch (September 10, 2013), available at <http://techcrunch.com/2013/09/10/court-nsa-violated-privacy-because-no-one-understood-the-rules/> (referencing a September 11, 2013 letter from Sen. Grassley documenting “substantiated instances of intentional misuse,” available at http://25.media.tumblr.com/51120b416d55a357a1325e2dfd1d79ae/tumblr_mtt56mCiWW1serkyyo2_r2_1280.png).

4. NSA spying has a chilling effect on political participation

In addition the Fourth Amendment's protections against searches & seizures absent individual suspicion, NSA surveillance also suppresses constitutionally-protected speech and association guaranteed under the First Amendment.²⁴ Since the COINTELPRO era, participants in social change movements have been aware of illegitimate government monitoring of their organizations and constitutionally protected activities.²⁵ New to the contemporary era, however, is the potential for overbroad spying to chill individual political participation before it happens.

Surveillance of organizations and individuals seeking domestic policy changes has been among the priorities of other domestic security agencies, including the FBI.²⁶ Rising awareness that simple political participation could land a person pursuing legitimate constitutionally protected expressive activity squarely in the crosshairs of intelligence agencies is enough to chill political speech and action by Americans who would otherwise consider them.²⁷ The NSA's unique capabilities render electronic speech especially vulnerable.²⁸

The suppression of civic participation as a result of NSA programming contravenes the most basic principles on which our democratic Republic was founded.

²⁴ See *First Unitarian Church of Los Angeles v. NSA*, Case No. CV13 3287 (N.D. Cal., 2013); Aubrey Bloomfield, *ACLU NSA Lawsuit: PRISM Violates the First and Fourth Amendments Of the Constitution*, (Sep. 10, 2013), available at <http://www.policymic.com/articles/48195/aclu-nsa-lawsuit-prism-violates-the-first-and-fourth-amendments-of-the-constitution>.

²⁵ US Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, *Final report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities* (1976) ; Federal Bureau of Investigations, COINTELPRO, available at <http://vault.fbi.gov/cointel-pro>.

²⁶ See Sarah Laskow, *Is the NSA surveillance program really about spying on environmentalists?*, The Grist (August 26, 2013), available at <http://grist.org/news/is-the-nsa-surveillance-program-really-about-spying-on-environmentalists/> ("Since the 2008 economic crash, security agencies have increasingly spied on political activists, especially environmental groups, on behalf of corporate interests....linked to the last decade of US defence [sic] planning, which has been increasingly concerned by the risk of civil unrest at home triggered by catastrophic events linked to climate change, energy shocks or economic crisis....").

²⁷ See Marcy Wheeler, *Government Spying: Why You Can't 'Just Trust Us'*, The Nation (July 8, 2013), available at <http://www.thenation.com/article/174888/government-spying-why-you-cant-just-trust-us#> ("...history reminds us that the government has abused surveillance authorizations in the past, as it did when it used COINTELPRO to spy on dissidents decades ago.").

²⁸ See Josh Levy, *NSA's surveillance programs are the 'most serious attacks on free speech we've ever seen'*, Boing Boing (Aug. 22, 2013), available at <http://boingboing.net/2013/08/22/opinion-nsas-surveillance-p.html>.

5. The Director of National Intelligence is not qualified to lead this review

Director of National Intelligence Eric Clapper has intentionally misled Congress and the American people. His public statements²⁹ have been directly contradicted by subsequently revealed facts.³⁰ The falsity of his statements ranges well beyond mere obfuscation.

In fact, the DNI's admittedly false answers to congressional inquiries are part of an overarching pattern of deception by federal agencies regarding the scope domestic surveillance authorized under the PATRIOT Act and 2008 FISA Amendments.³¹

Under Clapper's leadership, NSA activities prompted the extraordinarily deferential Foreign Intelligence Security Court (FISC) to conclude:

the *government's failure* to ensure that responsible officials adequately understood the NSA's alert process, and to accurately report its implementation to the Court, has prevented, for more than two years, both the government and the FISC from taking steps to remedy daily violations of the minimization procedures set forth in FISC orders and designed to protect [REDACTED] *call detail records* pertaining to telephone communications of *U.S. persons located within the United States who are not the subject of any FBI investigation* and whose call detail information *could not otherwise have been legally captured in bulk*.³²

Because DNI Eric Clapper has deliberately misled Congress and the American people, he cannot be trusted to lead the Review Group tasked with informing the President of its

²⁹ See Office of the Director of National Intelligence, *DNI Statement on Recent Unauthorized Disclosures of Classified Information*, (June 6, 2013), available at <http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/868-dni-statement-on-recent-unauthorized-disclosures-of-classified-information> (Falsely stating that "The court only allows the data to be queried when there is a reasonable suspicion, based on specific facts, that the particular basis for the query is associated with a foreign terrorist organization.").

³⁰ See United States Foreign Intelligence Surveillance Court Report, (Aug 31, 2009), 47-50, available at http://www.dni.gov/files/documents/section/pub_August%2019%202009%20Report%20of%20the%20US%20with%20Attachments%2020130910.pdf (declassified FISC report acknowledging unlawful NSA data collection of American citizens telephone metadata).

³¹ See Ruth Marcus, *James Clapper's 'Least Untruthful' Answer*, The Washington Post (June 13, 2013), available at http://articles.washingtonpost.com/2013-06-13/opinions/39950057_1_oversight-national-intelligence-national-security-agency; United Press Int'l, *Wyden 'deeply troubled' by Clapper's domestic-spying lie* (July 2, 2013), available at http://www.upi.com/Top_News/US/2013/07/02/Wyden-deeply-troubled-by-Clappers-domestic-spying-lie/UPI-69721372748400/; Andrew Rosenthal, *Making Alberto Gonzales Look Good*, NY Times (June 11, 2013), available at <http://takingnote.blogs.nytimes.com/2013/06/11/making-alberto-gonzales-look-good/> ("Government officials employ various tactics to avoid actually saying anything at intelligence hearings.... Outright lying is another matter."); David Harris Gershon, *Clapper Admits He Lied to Congress in Letter Posted by Senator Wyden*, Daily Kos (July 27, 2013), available at <http://www.dailykos.com/story/2013/07/27/1227008/-Clapper-Admits-He-Lied-to-Congress-in-Letter-Posted-by-Senator-Wyden#>.

³² US Foreign Intelligence Surveillance Court Order, 8-9, (March 5, 2009), available at http://www.dni.gov/files/documents/section/pub_March%202%202009%20Order%20from%20FISC.pdf (emphasis added).

scope and potential violations. In fact, the DNI's efforts to evade legitimate scrutiny of ongoing NSA violations of constitutional rights renders him unqualified for any position of federal authority.³³ Beyond removing him from his extraordinarily sensitive leadership position, his documented false statements to Congress should prompt an immediate impartial investigation and appropriate prosecution for perjury.³⁴

Allowing the Review Group to proceed and reach conclusions under Eric Clapper's direction will only further erode the confidence of the American people in the Review Group, as well as our government's ability to ensure national security while respecting our Constitution, more broadly.

³³ See Catherine Thompson, *Levin: Only Way To Hold Clapper Accountable Is For President To 'Fire Him'*, Talking Points Memo (July 16, 2013), available at <http://talkingpointsmemo.com/livewire/levin-only-way-to-hold-clapper-accountable-is-for-president-to-fire-him>

³⁴ See John Dean, *Will Director of National Intelligence James Clapper Be Prosecuted for Lying to Congress Regarding the NSA's Surveillance?*, Justia (June 28, 2013), available at <http://verdict.justia.com/2013/06/28/will-director-of-national-intelligence-james-clapper-be-prosecuted-for-lying-to-congress-regarding-the-nsas-surveillance#sthash.Ch7TcmsA.dpuf>; Citizens for Responsibility and Ethics in Washington, *CREW Calls on DOJ to Investigate DNI Clapper for Lying to Congress*, (Jul. 29, 2013), available at <http://www.citizensforethics.org/legal-filings/entry/crew-calls-on-doj-to-investigate-dni-clapper-for-lying-to-congress>; Shahid Buttar, *Cracks widen in the armor of the surveillance state*, People's Blog for the Constitution, (Aug. 1, 2013), available at <http://www.constitutioncampaign.org/blog/?p=14458> ("Director of National Intelligence James Clapper...not only has...sworn an oath of office which he violates every day, but he affirmatively lied to Congress in response to a direct question of which he advance notice. Clapper's crimes are vastly more severe than either Manning's or Snowden's, yet he...stand[s] above the law."); Ariel Edwards-Levy, *Prosecute James Clapper, Voters In Five State Polls Say*, Huffington Post (June 16, 2013), available at http://www.huffingtonpost.com/2013/08/16/james-clapper-poll_n_3769267.html; Chriss W. Street, *Will James Clapper Be Prosecuted For Lying To Congress?*, Breitbart (June 30, 2013), available at <http://www.breitbart.com/Big-Government/2013/06/30/Will-James-Clapper-Be-Imprisoned-For-Lying-To-Congress>.